

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Part 27 of the Commission's)	WT Docket No. 07-293
Rules to Govern the Operation of)	
Wireless Communications Services)	
in the 2.3 GHz Band)	

To: The Commission

COMMENTS OF BROADBAND SOUTH LLC

Broadband South LLC ("Broadband South"), by counsel, hereby responds to the Commission's request for comments on its proposal to revise the "substantial service" performance requirements applicable to licensees in the 2.3 GHz Wireless Communications Service ("WCS").¹ As described below, Broadband South believes that existing WCS licensees should have the right to choose to meet the performance requirements either under 1) existing rules and policies, or 2) under any rules or orders the Commission may adopt that afford licensees additional time to demonstrate "substantial service." Given the regulatory uncertainty that has beset WCS for the last several years and the imminent adoption of rules that will enhance the ability of WCS licensees to provide mobile broadband services, affording licensees the flexibility to meet the current standards or future requirements appropriately balances the rights of licensees with the Commission's desire to stimulate expeditious build-out. In addition, the Commission should not adopt formal, delay-inducing procedures that would permit the public to comment on WCS licensees' "substantial service" showings.

¹ See *Public Notice*, FCC 10-46, rel. March 29, 2010 ("*Public Notice*"). The *Public Notice* was published in the Federal Register on April 6, 2010. See 75 Fed. Reg. 17349 (Apr. 6, 2010).

Introduction

Broadband South is a wholly-owned subsidiary of Main Street Broadband, LLC (“Main Street”) that develops and operates wireless broadband systems in rural and underserved areas of southeast and southwest Georgia, the Florida Panhandle and northern Florida, relying in part on a \$33.8 million loan approved by the Rural Utilities Service in 2006.² Broadband South uses leased EBS and WCS spectrum to provide broadband service to unserved and underserved residences and businesses in 18 rural communities in southeast and southwest Georgia,³ and it is implementing plans to extend service to an additional 120 communities.⁴ Broadband South will serve these additional communities, and others, using a variety of spectrum solutions, including BRS/EBS (2.5 GHz), WCS (2.3 GHz) and 3650 MHz Service spectrum.

On December 4, 2008, Broadband South entered into a Spectrum Acquisition Agreement (“Agreement”) with NW Spectrum Co. (“NW”), holder of the Block A WCS authorization for the Jacksonville, FL-GA MEA (MEA009; Call Sign: KNLB213). The Agreement provides that NW will partition 43 Georgia and Florida counties to Broadband South upon grant by final order of NW’s pending application for renewal of the KNLB213 license.⁵ The Commission consented to the assignment on June 1, 2009.⁶ While the Renewal Application remains pending and the finality condition under the Agreement remains unsatisfied, Broadband South is deploying service in the area to be partitioned pursuant to a separate agreement with NW.

² See *News Release*, “\$33.8 Million From USA Rural Development Going to Georgia and Florida to Expand Broadband Access,” USDA Rural Development (rel. April 6, 2006), a copy of which is available at <http://www.rurdev.usda.gov/rd/newsroom/2006/BroadbandSouth.html> (visited Apr. 21, 2010).

³ On November 14, 2009, the Commission approved Main Street’s long-term *de facto* spectrum transfer lease of EBS spectrum licensed to the Brantley County Board of Education (Call Sign WLX683). See L000005983.

⁴ See http://www.mainstreetbb.com/service_area.html.

⁵ See File No. 0003001468 (“Renewal Application”). NW filed its renewal application on April 23, 2007. As the Commission is aware, many of NW’s renewal applications, including the application to renew the KNLB213 license, are the subject of a protracted dispute involving other parties that have claimed to have filed competing renewal applications.

⁶ See File No. 0003794840.

On June 1, 2009, NW filed a request with the Commission seeking additional time to demonstrate compliance with the “substantial service” requirements of Section 27.14(a) of the Commission’s Rules (“Extension Request”).⁷ This Extension Request remains pending, with the current “substantial service” deadline just a few months away.⁸

Broadband South and Main Street have expended significant funds to deploy and operate wireless broadband services. Broadband South is constructing point-to-point links using the KNLB213 spectrum in the Jacksonville MEA. Broadband South believes that it will complete construction of facilities by the July 21, 2010 deadline for NW to satisfy at least one of the existing “substantial service” “safe harbors” articulated in the *WCS Order*.⁹

On March 29, 2010, the Commission released the *Public Notice*. Separately, on April 2, 2010, the Commission invited comment on proposed rule amendments that would materially alter the interference and operating rules for WCS to promote mobile services,¹⁰ consistent with recommendations in the National Broadband Plan.¹¹ On April 8, 2010, the Commission announced its “Broadband Action Agenda,” which, among other things, describes plans to adopt new technical rules for WCS and SDARS “in Q2 2010.”¹² The Commission, however, has not

⁷ The Commission had previously granted WCS licensees a three-year extension of time to satisfy performance requirements. *See Order*, 21 FCC Rcd 114134 (2007) (“*WCS Extension Order*”) (extending deadline to July 21, 2010).

⁸ The Extension Request includes the KNLB213 license.

⁹ *See* Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (“WCS”), 12 FCC Rcd 10785 (1997) (“*WCS Order*”). The *WCS Order* stated that the following “safe harbors” would meet the “substantial service” test: (1) for a WCS licensee that offers fixed, point-to-point services, the construction of four permanent links per one million people, (2) for a WCS licensee that offers mobile services, coverage of 20 percent of the population, (3) specialized or technologically sophisticated service that does not require a high level of coverage to benefit consumers; and (4) service to niche markets or focus on serving populations outside of areas served by other licensees. *Id.* at 10844.

¹⁰ *See Public Notice*, “Commission Staff Requests that Interested Parties Supplement the Record on Draft Interference Rules for Wireless Communications Service and Satellite Digital Audio Radio Service,” DA 10-592, rel. Apr. 2, 2010 (“*WCS Rules Notice*”); *Order Extending Comment Period*, DA 10-622, rel. Apr. 13, 2010 (extending comment deadline to April 23, 2010).

¹¹ *See, e.g., “Connecting America: The National Broadband Plan”* at 85-86 (rel. March 16, 2010).

¹² *See News Release*, “FCC Announces Broadband Action Agenda,” (rel. April 8, 2010) and online Broadband Action Agenda (<http://www.broadband.gov/plan/broadband-action-agenda.html>) (visited Apr. 21, 2010).

acted on either NW's Renewal Application or its Extension Request. As explained below, the upcoming "substantial service" deadline – just three months away – coupled with the potential for new "substantial service" and technical rules and the pendency of the Extension Request and the Renewal Application, creates substantial uncertainty for licensees and lessees and justifies a flexible approach that affords licensees a choice between meeting existing "substantial service" requirements or new standards that the Commission may adopt.

Discussion

I. THE COMMISSION SHOULD ACT EXPEDITIOUSLY ON PENDING WCS MATTERS TO ELIMINATE ONGOING REGULATORY UNCERTAINTY.

In December 2006, the Commission approved a three-year extension for WCS licensees to demonstrate compliance with the performance requirements of Section 27.14(a). The Commission found in the *WCS Extension Order* that "WCS licensees have demonstrated that they face factors beyond their control that have limited their options in providing service" and that "limited deployment attempts using available equipment have been marred by technical problems or proved to be economically infeasible."¹³ The Commission added that "relatively restrictive OOB limits may have impeded the development of WCS equipment and have contributed to the unique circumstances of the band."¹⁴

Significantly, with about eight months remaining in the initial ten-year build-out period, the Commission acknowledged the licensees' position that a failure to extend the deadline would result in the construction of "sub-optimal, stop-gap systems intended simply to preserve their licenses" rather than advanced services using Wi-MAX technology.¹⁵ The Commission also

¹³ *WCS Extension Order* at 14139.

¹⁴ *Id.*

¹⁵ *Id.* at 14141.

noted that its pending proceeding would address power limits and other technical rules for SDARS repeaters.

Little has changed since the adoption of the *WCS Extension Order*, leading NW and other WCS licensees to seek a further limited extension. The Commission has not yet addressed the restrictive OOB limits for WCS and has not ruled on power limits for SDARS repeaters. In addition, as described in the Extension Request, the continuing uncertainty is complicated by arguments advanced by the Aerospace and Flight Test Radio Coordinating Council, which questioned the potential for interference that could result from operation of mobile WCS networks. While OOB rules, SDARS repeater power limits and aeronautical mobile telemetry interference issues presumably will be addressed in the context of the *WCS Rules Notice*, the fact remains that the rules have not yet been adopted and the future operating environment for WCS remains unsettled.

Moreover, the Commission has not acted on NW's Renewal Application in the three years that it has been pending. The failure of Commission staff to act on the matter creates additional uncertainty for NW and Broadband South. This uncertainty, which conceivably could result in the loss of NW's license, the loss of Broadband South's authority to operate under its agreement with NW and the inability of Broadband South and NW to consummate the partition of the Jacksonville MEA license, greatly restricts Broadband South's funding options and limits its ability to aggressively construct wireless broadband networks and serve numerous rural communities.

To clear up this uncertainty, the Commission should, as expeditiously as possible, revise its "substantial service" rules, grant the Extension Request, grant the Renewal application and adopt rules pursuant to the *WCS Rule Notice*. If possible, the Commission should act on all of

these items concurrently to comprehensively eliminate regulatory barriers and thereby promote expeditious build-out of advanced wireless broadband networks.

II. LICENSEES THAT CAN DEMONSTRATE “SUBSTANTIAL SERVICE” UNDER EXISTING RULES SHOULD NOT BE REQUIRED TO ALSO SATISFY NEW PERFORMANCE REQUIREMENTS.

The release of the *Public Notice* exacerbates the uncertainty associated with the Commission’s inaction. Released less than four months before the “substantial service” deadline, the *Public Notice* now asks for comment on proposed rules that would establish build-out milestones to be satisfied within 30 and 60 months. However, the *Public Notice* remains conspicuously silent about the application of the proposed rules to existing licensees that intend to demonstrate “substantial service” by July 21, as well as those that do not. Notwithstanding the documented uncertainty surrounding the technical rules and NW’s pending Renewal Application and Extension Request, Broadband South has justifiably relied on existing performance requirements and deadlines, and should not be forced at the eleventh hour to abandon its plans to meet a new set of standards.

Broadband South believes that the Commission should adopt a two-pronged approach that affords licensees maximum flexibility while ensuring expeditious build-out. First, licensees that have elected to construct under the existing standards of Section 27.14(a) and the “safe harbors” described in the *WCS Order* should be permitted to rely on these standards by demonstrating “substantial service” on or before the July 21, 2010 deadline. These licensees have relied on the relative certainty of those “substantial service” requirements and the upcoming deadline – as opposed to the uncertainty prevalent elsewhere in the WCS service – and have directed resources toward meeting standards that have been in place since 1997.

Moreover, licensees that satisfy “substantial service” by July 21 should not be subject to any further build-out or payload requirements that the Commission may impose in this proceeding.¹⁶ To apply new requirements to licensees that have demonstrated compliance with long-standing rules and policies would be like moving the goal line further away from a team that is on the one-yard line, ready to score.

If, however, a licensee files a “substantial service” notification that is found by the Commission to be unacceptable, the licensee should be permitted to demonstrate that it satisfies the new “substantial service” rules on or before the deadline for such showings. It would be patently unfair to penalize a licensee that made a good faith effort to build out and file a “substantial service” notification where a licensee that failed to construct or failed to file a “substantial service” notification has an extended opportunity to comply.

Second, the Commission also should grant the Extension Request to afford licensees additional time to demonstrate “substantial service,” to the extent a licensee elects not to meet the July 21, 2010 deadline. Licensees that have not constructed have experienced the uncertainty that has characterized WCS for many years and have been generally aware that the Commission has been considering rules that will enable more robust mobile services. With the release of the *WCS Rules Notice* and the expectation that the Commission will be acting soon, licensees that are planning to deploy mobile services under the newly-proposed rules should not be forced to quickly construct inferior facilities but should only be required to meet the new “substantial service” rules.

¹⁶ The *Public Notice* suggests that WCS licensees should be subject to a minimum payload capacity requirement. Broadband South opposes this under any circumstances, and notes that such a requirement may be incompatible with services deployed under current rules.

III. THE COMMISSION SHOULD NOT AFFORD THE PUBLIC AN UNNECESSARY OPPORTUNITY TO COMMENT ON CONSTRUCTION NOTIFICATIONS.

The *Public Notice* seeks comment on the Commission's proposal to permit the public to have an opportunity to review and comment on a licensee's "substantial service" demonstrations.¹⁷ Broadband South believes that, outside the context of a license renewal application, implementing a discrete formal objection process for "substantial service" showings would be contrary to the public interest and should not be adopted.

Public objections to a licensee's "substantial service" showing should occur only within the context of a license renewal application. Establishing an additional "bite at the apple" would be redundant. The public already may, consistent with existing Commission procedures, seek to deny a licensee's renewal application by demonstrating that grant of the application would be inconsistent with the public interest.¹⁸ To the extent that the Commission's proposal invites the filing of objections at various times *during* the license term, *i.e.*, after a licensee submits evidence that it has satisfied interim build-out milestones, the ten-year license term is effectively reduced. Rather than being exposed to petitions every ten years, WCS licensees would face potential opposition throughout the license term. The certainty eliminated by action on pending WCS matters would be replaced by ongoing uncertainty.

This uncertainty would be compounded by delays inherent in the review of competing information in the record and by potential abuse of Commission processes that would inevitably arise. Any member of the public could file an objection to a "substantial service" showing, regardless of factual basis. It is not hard to imagine a disgruntled employee or competitor filing a frivolous objection that does not meet the Commission's standing or procedural requirements.

¹⁷ See *Public Notice* at 3 (Commission "envision[s]" a public comment opportunity).

¹⁸ 47 C.F.R. §1.939.

Yet, the Commission must divert its limited resources toward handling such objections, even though they are in plain violation of Commission rules. Even assuming that a petition is credible, Commission staff could be required to choose from among differing views on what constitutes “reliable signal coverage” or other standard the Commission may adopt. Determining which party is correct may involve a high level of technical understanding that could take significant time to resolve. Thus, the submission of objections would tie up the license in the Commission’s adjudicatory process in the middle of the license term, with no specified timeframe for resolving the objections, whether credible or frivolous. Not unlike the current situation involving purported challenges to NW’s renewal applications, a licensee may be unwilling to continue to build out or would be unable to obtain third-party financing if its “substantial service” showing were petitioned even on the most frivolous grounds. This creates an environment ripe for “greenmailing” the licensee in exchange for money or some other consideration.

Third, adopting formal procedures for public objection to “substantial service” showings would be contrary to procedures for other wireless services. As a notification (and not an application), “substantial service” showings are not required by statute to be subject to petitions.¹⁹ No existing Part 27 rule authorizes the filing of objections to “substantial service” showings in any wireless service. Notwithstanding the absence of public comment, the Commission has been able to perform well its regulatory function of determining whether a

¹⁹ See 47 U.S.C. §309(b), (d) (permitting the filing of petitions to deny for applications for “instruments of authorization” in the described services).

licensee has satisfied “substantial service.”²⁰ The Commission has presented no basis in the *Public Notice* to justify a departure from its long-standing policies.

Conclusion

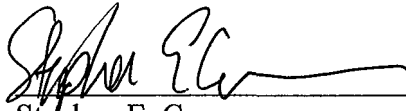
For the above-stated reasons, Broadband South respectfully requests that the Commission should permit existing WCS licensees to demonstrate “substantial service” under existing rules and policies or under any rules or orders the Commission may adopt that afford licensees additional time. In addition, the Commission should not adopt formal procedures for the filing of objections to “substantial service” showings.

Respectfully submitted,

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²⁰ See, e.g., *Scott D. Reiter*, FCC 10-52, rel. Apr. 16, 2010 (upholding Mobility Division’s decision holding that PCS coverage to 11.4 percent of the licensed area and service to four handsets does not meet “substantial service” test for PCS).